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No. 80-1719

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES R. MAZZULLO, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April 14, 1981

QUESTION PRESENTED[1]

Does the Coast Guard, in fulfilling its duty under 14 U.S.C. § 88 to render aid to persons in distress have a duty no greater than that of any private salvor, even though:

a. The legislative history of 14 U.S.C. § 88 indicates that Congress intended the Coast Guard to be reasonably obligated to render aid, and the Coast Guard's operating orders, as well as parallel statutory provisions, support such a conclusion;

b. Treaty obligations (see International Conference on the Safety of Life at Sea of 1960, 16 U.S.T. 185), in conjunction with an implementing Executive Order, impose upon the Coast Guard a mandatory duty to render aid when it is reasonably possible to do so; and

c. The federal maritime duty of *Indian Towing* imposes upon the Coast Guard, once it has assumed either a general or a particular control over search and rescue activities, a duty to reasonably perform that function and to perform it with due care.

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[1] Parties to the proceeding below (see Rule 21.1(b) of the Rules of this Court) were Appellants James R. Mazzullo and Ann Marie Mazzullo, administrators of the estates of Thomas William Mazzullo and Kathleen Cotturo Mazzullo; Carl Baldwin and Mary Baldwin, administrators of the estate of Michael Baldwin; and William R. McCardell, Jr., administrator of the estates of Richard Mazzullo, Nancy Verdin Mazzullo, Robin Mazzullo, Anthony Mazzullo and Matthew Mazzullo; and Appellee the United States of America.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported, and is reproduced in Appendix A at pages 1a-2a. The opinion of the district court is unreported and is reproduced in Appendix B at pages 3a-18a.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1980, and is reproduced in Appendix C at page 19a. The petition for rehearing with suggestion for rehearing

en banc was denied on January 14, 1981. The orders denying rehearing are reproduced in Appendix D at pages 20a-21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, TREATIES AND EXECUTIVE ORDER INVOLVED

This case involves interpretation of the following statutes, treaties and Executive Order:

1. Coast Guard, 14 U.S.C. §§ 2, 88 (Appendix E, 23a-24a);

2. Convention On The High Seas, 13 U.S.T. 2314, Article 12 (Appendix F, 25a);

3. International Conference For The Safety Of Life At Sea of 1960, 16 U.S.T. 185, Regulations 10, 15 (Appendix F, 25a-26a);

4. Executive Order 11239, Enforcement Of The Convention For The Safety Of Life At Sea, 1960 (July 31, 1965) (Appendix G, 27a-28a).

STATEMENT OF THE CASE

Petitioners (plaintiffs and appellants below) are the personal representatives of eight persons who died at sea as a result of the sinking of their fifty-three foot motor launch, SEA BOY II, on or about December 20, 1973, in the Bahama Islands. The district court's jurisdiction to consider the case was founded on the Suits in Admiralty Act, 46 U.S.C. § 742 *et seq.*, and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et seq.*[1] This is an admiralty and maritime claim within the meaning of Rule 9(h), Fed.R.Civ.P.

[1] The DOHSA complaint (which also contained counts against the owner and the shipbuilder, both of which have been settled) was originally filed in Maryland but was subsequently transferred to the District Court for the District of Columbia, where it was consolidated with a suit for exoneration from or limitation of liability by the owner of SEA BOY II.

The Respondent (defendant and appellee below) is the United States, on behalf of the United States Coast Guard. The Bahamas fall within the Coast Guard's District 7; the Coast Guard's Miami Rescue Coordination Center ("RCC") has responsibility for search and rescue operations in this area. The Miami RCC maintains a 24-hour watch for air and sea emergencies and has extensive ship and plane facilities designed and maintained solely for search and rescue operations.[2] The allegation is negligence and default on the part of the Coast Guard in failing to attempt any rescue during the initial twelve hours following receipt of distress signals from the SEA BOY II.

Statement of Facts[3]

The undisputed facts involved in the appeal are that on the night of December 20, 1973, the SEA BOY II, with eight persons aboard, including three small children, was operating off the Berry Islands in the Bahamas when she encountered a heavy storm occasioned by a fast moving cold front. The vessel sent out a "MAYDAY" or distress message at 8:05 and again at 8:10 p.m. The message was picked up by the SILBA, a Yugoslavian merchant vessel approximately 20 miles away, which relayed the message: "MAYDAY. SEA BOY II, TWO MILES EAST OF WHALE CAY." The distress relay was received up and down the East Coast of the United States by the Coast Guard's radio guard stations and placed on its teletype search and rescue ("SAR") network. At 8:17 p.m. the message was received and logged by the Miami RCC.

Recognizing the severity of the situation, the officer in charge at Miami RCC classified the SEA BOY II as in a "distress phase" as defined in the National Search and Rescue

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[2] The Coast Guard undertook over 64,000 rescue missions in 1973, costing approximately $165 million. *See infra*, n. 33.

[3] The district court made certain findings of fact which are set out in its opinion. See Appendix B, 5a - 10a. The court of appeals did not discuss the district court's factual findings in its two-page, unpublished opinion, except to note that it had "examined the full record" and found "no error in the District Court's conduct of the trial." Appendix A, 2a.

Manual ("SAR Manual"[4]) and the Coast Guard 7th District Operation Plan.[5] Miami RCC assumed jurisdiction over the incident, becoming the SAR Mission Controller ("SMC").[6] Nonetheless, in flat contradiction of its operating regulations, Miami RCC failed to dispatch any aircraft, determine local weather conditions, or even alert other facilities.[7] (There were

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[4] The National Search and Rescue Manual is a document coordinated by the Coast Guard and promulgated jointly by several military and civilian agencies to provide guidance to personnel participating in search and rescue operations. The SAR Manual defines three classifications for SAR missions: uncertainty phase, alert phase and distress phase. SAR Manual 7-16. Of these, the distress phase is the most urgent. The phase in which an incident is classified defines the actions to be taken by the SAR facility of the district concerned. In the words of the Manual,

> "The distress phase is assigned anytime immediate assistance is required by a craft or person because of being threatened by grave and imminent danger, or because of continued lack of information concerning progress or position. The key words are *grave danger* and *immediate assistance.*" (Emphasis in original.)

The Manual goes on to outline the actions to be taken after a vessel has been classified as "distress phase". See Appendix H, 29a - 30a.

[5] The Operations Plan implements the SAR Manual within the Coast Guard's 7th District. The Miami SAR Plan, which is an annex to the Operating Plan, "is the basic operating plan for Search and Rescue and contains policies and procedures for the conduct and coordination of SAR activities in the Miami SAR Sub-Region." The Miami SAR Plan provides for certain actions "required in each distress incident":

> "a. Any command or individual having knowledge of a distress should immediately advise the Miami SAR Coordinator (COGDSEVEN) or the nearest Coast Guard unit and should take all reasonable measures to render assistance.
>
> "b. Coast Guard units will promptly report to the Miami RCC all SAR incidents and *take prompt action to render assistance* within the capabilities of available personnel and equipment. . . " (Emphasis added).

The Miami SAR plan goes on to outline actions to be taken in a distress case. See Appendix H, 31a - 34a.

[6] The district court expressed doubt that the Coast Guard actually took control of the rescue operation. However, Lieutenant Acker, the duty officer at RCC Miami on the night in question acknowledged in his deposition that he assumed jurisdiction, becoming SMC no later than 8:55 p.m.

[7] Inexplicably, a tape recording of all voice communications occuring at Miami RCC on the night of December 20 and the morning of December 21

(footnote continued)

six rescue planes available in Miami alone, with other U.S. military planes and boats available at other locations, including the Bahamas.) Instead of acting to respond to the distress call with available facilities, Miami RCC engaged for the next twelve hours in an identification of the vessel's ownership and registry.

Five hours later, at 1:00 a.m., the Miami rescue watch made the affirmative decision not to proceed with a rescue attempt, noting in the log:

> "... Don't plan action at all yet. Will sit on it and see what BASRA[8] can get on it in a.m. after weather clears. Don't plan tfc [traffic]."

It also released two merchant vessels from standby and shut down the SAR network for the night. Twelve hours later, at about 7:50 a.m., the succeeding rescue watch diverted a plane completing a rescue mission in the Bahamas to check the reported distress location where the pilot spent about an hour without a sighting.

By the evening of the 21st, the Miami rescue station had been advised that the SEA BOY II and her eight passengers were overdue from their expected arrival in Nassau. At 10:00 p.m. a plane was dispatched to drop a marking buoy at the location off Whale Cay which would show the direction of the vessel's drift over the intervening 24-hour period. The marking buoy failed on impact. On the morning of December 22nd, thirty-six hours after receipt of the original MAYDAY message, a full rescue search was initiated with a patterned search[9] in accordance with the procedures outlined in the SAR Manual. By the afternoon, debris was found over a broad area and two

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(footnote continues)

was erased, despite the fact that regulations require the tape to be kept. SAR Manual § 224(b)-6.

[8] BASRA is Bahamas Air Search and Rescue Association, a voluntary private organization of boat owners in the Bahamas that assist in rescue activities.

[9] Concentric widening squares over areas of the sea in the direction of set and drift of a disabled vessel from an estimated location of distress, as prescribed in the SAR Manual.

days later the sunken hull of the vessel, not more than twenty miles from the original reported distress location, was found. The bodies of the victims were never found.

Disposition Below

After trial to the court on liability alone, the district court entered judgment in favor of the defendant, finding that the plaintiffs had failed to show that the Coast Guard had any affirmative duty to undertake or complete a rescue attempt.[10]

On appeal, appellants presented to the court three bases upon which a duty running from the Coast Guard to the decedents could be predicated, default upon any one of which would render the Coast Guard liable under the Death on the High Seas Act, 46 U.S.C. §761, and Suits in Admiralty Act, 46 U.S.C. §742.[11] The first basis was statutory, 14 U.S.C. §88, which authorizes the Coast Guard to engage in rescue activity, and which—despite permissive language in the statute—was historically intended to *require* the Coast Guard to exercise its discretion responsibly in performing its assigned rescue functions.[12] The second basis is found in treaty and Executive Order which obligate the Coast Guard to make reasonable attempts to rescue those in distress near our shores.[13] The Coast Guard's failure to honor these mandates placed it in default of its obligations under 14 U.S.C. §2[14] which requires that it *shall* enforce all federal laws applicable to the high seas. The third basis is the duty of due care brought into play by the Coast Guard's assumption of coordination and control over rescue

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[10] Appendix B, 10a. The court also ruled that plaintiffs had failed to show a causal connection between the Coast Guard's failure to act and the loss of the SEA BOY II. Appendix B, 16a-17a.

[11] See Appendix E, 22a-23a.

[12] While several circuits have interpreted 14 U.S.C. § 88, so far as can be determined, *no* court has examined the legislative history of 14 U.S.C. § 88. In view of the uncertain intent of the permissive language of the statute, it is unfortunate that the D.C. Circuit also chose to leave it unexamined.

[13] See Appendix F, 25a - 26a. The effect of these treaty obligations, and of the implementing Executive Order, like the legislative history of 14 U.S.C. § 88, so far as can be determined, have not been examined previously by any court.

[14] See Appendix E, 23a.

activity in general, and by its particular assumption of coordination and control over rescue activity in this case. *See Indian Towing Co. v. United States,* 350 U.S. 61 (1955).

The court of appeals affirmed without explicitly addressing the question of duty.[15]

REASONS FOR GRANTING THE PETITION

This petition presents for review a question on which there is a clear conflict between the circuits. The question concerns the duties and standard of care to which the Coast Guard should be held in rescue operations where it knows or has reason to believe that lives are in peril at sea. From a broader perspective, the question concerns the meaning of permissive language in the statutory mandate which Congress has given to the Coast Guard: precisely what standard of duty did Congress intend to impose, if any, when it directed that the Coast Guard *may* perform certain acts? In the statutory provision at issue here, did the Congress, by directing that the Coast Guard may perform "any and all acts necessary to rescue and aid persons. . ."[16] mean nothing more than to hold the Coast Guard to

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[15] See Appendix A, 1a-2a. The court of appeals' decision was a highly unconventional one. The district court decided the case on the supposed lack of duty and absence of causation. The appeal challenged these holdings, and left unexamined the issue of negligence which had also been before the court below. The court of appeals found it unnecessary to reach the issue of duty, finding "no basis for determination that the Coast Guard acted unreasonably" in a situation where "information is meager and conditions shifting and uncertain"—an issue not briefed or argued by appellants. This approaches, if it does not actually constitute, a denial of the right of appeal from the district court's adverse decision on the duty issue.

[16] Title 14 U.S.C. §88 (emphasis added). In context, the provision is:

"(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction . . . the Coast Guard may:

"(1) perform any and all acts necessary to rescue and aid persons and protect and save property. . ."

the same standard (the so-called "Good Samaritan" standard[17]) as any disinterested bystander? In comparative terms, did Congress mean to impose the same duty as is imposed by the companion provision which directs that the Secretary of Transportation "*may* mark for the protection of navigation any sunken vessel. . ."?[18] This is an area of the law in which decisions are conflicting and confused, and in which there is an urgent need of guidance from this Court.

1. The Circuits Are Split On The Extent And Nature Of The Coast Guard's Duty To Rescue.

In the present case, the courts below held that the language of 14 U.S.C. §88 is entirely permissive.[19] In accord with the decision below is the decision of the Court of Appeals for the Third Circuit in *Frank v. United States,* 250 F.2d 178 (1957),

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[17] The Good Samaritan standard, advanced by the government below as the applicable standard here, is that:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for protection of the other person or things is subject to liability to the other for physical harm resulting from his failure to exercise care to perform his undertaking, if
>
> "(a) His failure to exercise such care increases the risk of such harm, or
>
> "(b) The harm is suffered because of the other's reliance upon the undertaking."

Restatement 2d, Torts §323.

[18] Title 14 U.S.C. §86 (emphasis added). In context, the provision is:

> "The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable water or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require."

The Secretary is the Secretary of Transportation. The marking is carried out by the Coast Guard. *See Lane v. United States,* 529 F.2d 175 (4th Cir. 1975). In the interpretation of the permissive language of this provision, as in the interpretation of the permissive language in 14 U.S.C. §88, there is a split between the circuits. *Compare Lane v. United States,* 529 F.2d 175 (4th Cir. 1975) *with Chute v. United States,* 610 F.2d 7 (1st Cir.), *cert. denied,* 100 S.Ct. 2155 (1980).

[19] Appendix A, 2a; Appendix B, 11a.

where it was held that the Coast Guard's duty to render assistance is a voluntary one, and rises no higher than that of a private salvor.

The effect of these holdings is to remit the plaintiff in any action against the Coast Guard arising from a negligent rescue attempt strictly to common law remedies, and to impose upon the Coast Guard, despite its expertise and the dedication of substantial resources, a duty no greater than that of any bystander who, observing a person in a situation of peril, is not bound to take any particular action and may act or refrain from acting as a matter of free and unfettered discretion.[20]

A corollary effect of the holding is to give an interpretation to the permissive provision of 14 U.S.C. §88 which is discordant with interpretations of the permissive provision of 14 U.S.C. §86 concerning the marking of submerged obstacles to navigation. Some courts interpreting §86 have found that if the Coast Guard knows of a hazard to navigation it does not have a free and unfettered discretion to mark it or not as it pleases, but must "exercise [its] discretion responsibly. [It] is not to ignore submerged wrecks of which [it] is informed. . ." *Lane v. United States,* 529 F.2d 175, 179 (4th Cir. 1975).[21] These holdings impose upon the Coast Guard, under directory language precisely similar to that in 14 U.S.C. §88, an obligation greater than that imposed under §88 by the courts below in the present case, and a duty greater than that of a mere bystander: a "discretionary obligation" which, if exercised at all, must be exercised responsibly.

In direct conflict with the decisions in the present case and in the Third Circuit is the position taken by the Fifth Circuit in *United States v. Gavagan,* 280 F.2d 319, 323, 326-28 (5th Cir. 1960), *cert. denied,* 364 U.S. 933 (1961), which held that

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[20] A bystander is liable only if he aggravates the situation of the person in peril. At trial plaintiffs pointed out that the Coast Guard did, in fact, aggravate the peril of SEA BOY II by releasing two merchant vessels from their obligation to assist. The court rejected this proposition.

[21] *See also Offshore Transportation v. United States,* 465 F. Supp. 976 (E.D.La. 1979); *Doyle v. United States,* 441 F. Supp. 701 (D.S.C. 1977). *Contra, Chute v. United States,* 610 F.2d 7, 12-13 (1st Cir. 1980).

despite the discretionary language of 14 U.S.C. §88, the Coast Guard, in undertaking a rescue attempt, has a duty to perform with reasonable care (a standard similar to that imposed in *Lane*), and a scope of discretion markedly less than that of a private salvor.[22] As shown below, this decision is in accordance with the legislative history of 14 U.S.C. §88, Coast Guard operating orders, judicial interpretation of parallel statutory provisions, treaty obligations, and the federal maritime duty of *Indian Towing*.

2. The Legislative History Of 14 U.S.C. §88, Coast Guard Operating Orders, And Parallel Statutory Provisions Indicate That 14 U.S.C. §88 Imposes An Obligation On The Coast Guard To Render Aid

There is abundant authority that 14 U.S.C. §88, although phrased permissively ("the Coast Guard *may* . . . perform any and all acts necessary. . ."), was intended to impose *some* obligation on the Coast Guard—certainly an obligation greater than that of a mere bystander, a stranger to the statute, bound only by ordinary principles of the law of torts.

a. The *legislative history* of 14 U.S.C. §88 establishes that the Coast Guard has been charged from its inception with a *duty* to perform rescue operations.[23] This duty, although of

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[22] The *Gavagan* decision also set forth an alternate basis for finding the government liable. That alternate basis was the full satisfaction, in that case, of the elements needed to bring the Good Samaritan doctrine into play—i.e., the worsening of the plaintiff's situation by the negligent action of the Coast Guard. A subsequent decision in the Fifth Circuit, citing *Gavagan*, discussed the Good Samaritan doctrine and again found liability for the Coast Guard for negligent conduct of a rescue where the acts of the Coast Guard had worsened the situation of the plaintiff. *United States v. Devane*, 306 F.2d 182 (5th Cir. 1962). Any comments in *Devane* concerning the question of whether the Coast Guard would have been liable had there been no worsening of the vessel's situation must be regarded as *dicta*.

[23] The Coast Guard was created in 1915 in order to increase the efficiency of two overlapping federal agencies: the Revenue-Cutter Service and the Life-Saving Service. Both of these services engaged in life-saving operations, and prior statutes made this an *obligatory*, non-discretionary part

(footnote continued)

course not intended to make the Coast Guard a guarantor of safety at sea, does mandate that rescue facilities be established and used for rescue operations "as circumstances may require."[24] In this context, the permissive language of 14 U.S.C. §88 can be read to free the Coast Guard from any guarantee or obligation to successfully rescue those in distress in all situations; but should not be read to leave the Coast Guard free to ignore pleas for help when rescue is reasonably possible.

b. *Operational orders* issued to Coast Guard personnel who carry out the search and rescue function interpret the statutory obligation as imposing at the least a responsibility to reasonably undertake a search and rescue operation whenever lives are known or believed to be in imminent peril and personnel and equipment for search and rescue are available.[25] An agency's

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(footnote continues)

of their responsibilities. *See, e.g.*, Title XXIV, Ch. 3, §2759, 18 Stat. 262 (1861). The 1915 statute, being organizational in nature, did not change these obligations. See Ch. 20, §2, 38 Stat. 801 (1915). The forerunner of the present language (which has been modified only slightly since then, see Pub. L. 91-278, 91st Cong., 2d Sess. (1970)) controlling Coast Guard rescue functions was enacted in 1949, and was not intended to change the current understanding of Coast Guard obligations. *See* S. Rep. No. 656, 81st Cong., 1st Sess. (1949), *reprinted in* (1949) U.S. Code Cong. & Admin. News 1652; H.R. Rep. No. 557, 81st Cong., 1st Sess. (1949), *reprinted in* (1949) U.S. Code Cong. & Admin. News 1680.

[24] *See* Title XXIV, Ch. 3, §2759, 18 Stat. 262 (1861).

[25] For instance, the Coast Guard Seventh District Operation Plan provides (see Appendix H, 32a-33a):

> "*Specific Actions Required.* The activity controlling the SAR incident (Miami SAR Coordinator or designated SAR Mission Coordinator) will take the following actions as soon as information is received that a SAR incident exists.
>
> * * *
>
> "c. ***Distress Phase***
>
> "(1) *Dispatch personnel and equipment in a coordinated effort to locate and rescue* persons and property in distress.
>
> "(2) Initiate action in accordance with established doctrine and detailed SAR plans including the following:
>
> "(a) Determine most probable location of the distress incident by all available means.

(footnote continued)

own interpretation of its statutory mandate generally should be accorded deference by the courts.[26]

c. The *parallel statutory provision* of 14 U.S.C. § 86, which concerns the Coast Guard's marking of obstacles to navigation, has been held to impose upon the Coast Guard a duty similar to that which Petitioners submit should be imposed upon the Coast Guard under 14 U.S.C. § 88. In view of the similarity of the directory language in the two statutes, uncertainty and inconsistency result if the Coast Guard is held to a different standard of duty under the two provisions.

Section 86 provides that

"The Secretary *may* mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable water or waters above the continental shelf of

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(footnote continues)

"(b) Determine on scene weather"

(Emphasis added.)

Similarly, the Miami RCC Standing Watch Order, set out in a memo from the Chief of Search and Rescue, Miami, provides (see Appendix H, 25a):

"*Never hesitate to dispatch a SAR unit.* You will never be criticized for taking positive action. The greatest sin we can commit is not taking action when we should." (Emphasis added.)

These provisions carry out the following instruction from the SAR Manual (Appendix H, 29a):

"*Distress Phase*

"The distress phase is assigned anytime immediate assistance is required by a craft or person because of being threatened by grave and imminent danger, or because of continued lack of information concerning progress or position. The key words are *grave danger* and *immediate assistance.*

"*Actions During The Distress Phase*

• • •

"(b) Type and number of SAR units to be used is determined SRU crews are briefed and SRUs dispatched.

"(c) Secondary SAR facilities, rescue teams, other personnel, and assisting agencies are alerted, if not already accomplished." (Emphasis added.)

[26] *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968).

> the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require."

This has been held to require the Coast Guard to exercise a responsible discretion and not "to ignore submerged wrecks of which [it] is informed or fail to mark them if they constitute real dangers to navigation." *Lane v. United States*, 529 F.2d 175, 179 (4th Cir. 1975).[27] Consequently, under 14 U.S.C. § 86, when the Coast Guard is aware of such an obstacle to navigation it may not refrain from taking the crucial step of marking that obstacle in such a way as to provide fair warning to navigators. Similarly, under 14 U.S.C. § 88, when the Coast Guard is aware of a vessel in distress and of its approximate location and when personnel and equipment are available, it should not be free to refrain from taking the crucial step of carrying out a search and rescue attempt.

The interpretation of 14 U.S.C. § 88 as set out in the legislative history and the Coast Guard Operating orders, and the interpretation of the duty imposed upon the Coast Guard by 14 U.S.C. § 86, are all consistent with the *Gavagan* decision, but not with the position taken by the courts below in this case.

3. Treaty Obligations, In Conjunction With An Implementing Executive Order, Impose Upon The Coast Guard A Mandatory Duty To Render Aid When It Is Reasonably Possible To Do So.

The Coast Guard is bound by Treaty and Executive Order to utilize its resources to assist those in distress in waters within its jurisdiction. The International Conference for the Safety of Life at Sea,[28] alone[29] and in conjunction with Executive Order

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[27] *See also Offshore Transportation Corp. v. United States*, 465 F. Supp. 976 (E.D.La. 1979); *Doyle v. United States*, 441 F. Supp. 701 (D.S.C. 1977); *compare Chute v. United States*, 610 F.2d 7 (1st Cir. 1979).

[28] 16 U.S.T. 185, T.I.A.S. 5780 (1960), Appendix F, 25a-26a.

[29] A ratified treaty is enforceable federal law, legally equivalent to a federal statute. U.S. Const. Art. VI, Cl. 2; *Tag v. Rogers*, 267 F.2d 664, 668 (1959), *cert. denied*, 362 U.S. 904 (1960). This Treaty was ratified in April 1962. *See* 9 Whiteman, Digest of International Law, 162-167 (1963).

11239,[30] directly mandates, first, that the master of *any* vessel receiving a signal of distress must render assistance "with all speed"[31] and second, that any government signing the treaty establish *and operate* rescue facilities necessary and practicable to rescue persons in distress.[32] Executive Order 11239, issued "to give full and complete effect to the Convention. . . " *directs* federal agencies, including the Coast Guard, to "perform the functions and duties therein prescribed and undertaken which appertain to the functions and duties which they severally *are now authorized or directed* to perform," 32 Fed. Reg. 16247 (emphasis added). The Order directed the performance of duties pursuant to the treaty where these activities might have been only authorized, and not directed, by pertinent statutes. The Order thus made mandatory rescue responsibilities even if under statute these responsibilities might have been construed as authorized and permissive.

The clear language and purpose of the Treaty and Executive Order establish an independent federal duty upon the Coast Guard to reasonably attempt the rescue of those known to them to be in distress near our shores. This independent duty can be reconciled with the duty to carry out the search and rescue responsibility with reasonable care, as set out in *Gavagan,* but cannot be reconciled with the lesser duty, comparable to that of a private salvor, recognized by the D.C. Circuit in this case and the Third Circuit in the *Frank* case.

4. The Federal Maritime Duty of *Indian Towing* Imposes On The Coast Guard A Duty Reasonably To Perform Search And Rescue Operations.

The implication of a duty to rescue is supported by the principles set out in *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), where this Court held the Coast Guard liable for negligent performance of a task upon which the public had

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[30] 32 Fed. Reg. 16247 (1965), Appendix G, 27a-28a. Executive Orders issued pursuant to law "are accorded the force and effect of a statute," *Assn. for Women in Science v. Califano,* 566 F.2d 339, 344 (D.C. Cir. 1977).

[31] Chapter 5, Regulation 10, Appendix F, 25a.

[32] Chapter 6, Regulation 15, Appendix F, 26a.

come to rely. In the maritime context the rule of *Indian Towing* must be liberally construed, in accordance with the "liberal character of proceedings in admiralty to give [rather] than to withhold the remedy when not required to withhold it by established and inflexible rules," *Sea Land Services v. Gaudet*, 414 U.S. 573, 583 (1974). The teaching of *Indian Towing* is that once the Coast Guard assumed control of search and rescue responsibilities on our coasts, it assumed a duty to carry out those responsibilities with due care.

The Coast Guard is very different from the private Good Samaritan who, in response to the needs of the moment, provides assistance in an isolated situation. The Coast Guard has become a massive, highly skilled organization which has assumed primary responsibility for regulation, promotion of safety, and rescue at sea. All these functions are widely publicized. In 1973, it devoted a force of nearly 13,000 persons to search and rescue operations and undertook over 64,000 rescue missions, costing approximately $165 million.[33] By its presence, size, manner, and efficiency of operations, it has assumed the principal responsibility for maritime search and rescue activity, displacing the development and organization of other rescue alternatives that otherwise might be available. It has, therefore, undertaken performance of a task upon which the public has come to rely and concomitantly has undertaken a duty to perform that task with due care.

In this case, government responsibility attached both through the Coast Guard's *general* assumption of control over rescue operations in the waters where the SEA BOY II sank unaided, and through the Coast Guard's *particular* assumption of control over the rescue operations in this situation.

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[33] *See* Department of Transportation Annual Report 116 (1973); Hearings on Department of Transportation and Related Agencies Appropriations for Fiscal Year 1974 Before the Subcommittee of the House Committee on Appropriations, 93rd Cong., 1st Sess. 241, 248 (1975), and Hearings on Department of Transportation and Related Agencies Appropriations for Fiscal Year 1975 Before the Subcommittee of the House Committee on Appropriations, 93rd Cong., 2d Sess. (1976).

a. The Coast Guard's *general* assumption of control over rescue operations in this area, over a period of years, established the corresponding duty to not default on these responsibilities.

The search and rescue functions performed by the Coast Guard may be compared to the functions of air-traffic controllers. In the context of air-traffic control, the courts have noted three factors which tend to establish that the government, in performing a particular function, has taken over that function to such an extent that it should be held liable for failures to perform with due care.[34] The first of these is the existence of federal rules designed to establish standards of care for the protection of the public. Such rules exist in the present case in the guidelines set out in the SAR Manual, as supplemented by regional annexes and specific local operating instructions.[35] The second factor is the nature and indispensability of the function which the government has undertaken to perform. The need to impose a duty to assist in rescue efforts upon all vessels reasonably able to do so has long been recognized as indispensable by the law of the sea; any vessel, Coast Guard or commercial, in a position to provide assistance is required to do so.[36] The duty to rescue in maritime is intrinsic to the ability to

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[34] *See Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1978); *and see Eastern Airlines v. Union Trust Co.*, 95 U.S. App. D.C. 189, 211 F.2d 62 (1955), *aff'd per curiam; United States v. Union Trust Co.*, 350 U.S. 907 (1955); *Delta Air Lines v. United States*, 561 F.2d 381 (1st Cir. 1977); *Dickens v. United States*, 646 F.2d 886 (5th Cir. 1977); *Freeman v. United States*, 509 F.2d 626 (6th Cir. 1975); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970); and *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967).

[35] Appendix H, 29a-35a. Having established these standards, the government cannot ignore them. *Cf., Service v. Dulles*, 354 U.S. 363, 388 (1957): "While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them."

[36] *See* International Conference for the Safety of Life at Sea, Appendix F, 25a. This injunction is repeated in the Convention on the High Seas, 13 U.S.T. 3212, T.I.A.S. 5200 (1958), Appendix F, 25a. *See also Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers*, 418 F. Supp. 656,

(footnote continued)

do so, and it is clear that the duty of the Coast Guard cannot be *less* than the duty of a nongovernmental entity in this respect. The third factor is the need for public reliance on the particular function concerned. Thus the need for the public to be able to rely on a functioning system of air-traffic control in itself creates a requirement that air-traffic controllers act with due care. Similarly, the public must be able to rely on the Coast Guard as a source of search and rescue functions, for other possible sources of assistance have in large part been superseded by the Coast Guard's network of search and rescue facilities, and its pervasive assumption of control in this area.

The three criteria being satisfied, it is proper that the rescue operations of the Coast Guard at sea, just as the guidance activities of air controllers in the air, be held to a standard of due care. The function each has voluntarily assumed plays too important a role and has become too integral a part of public expectations to be viewed as uncertain or undependable by the law. Thus, the general assumption of control over rescue responsibilities must carry with it a corresponding obligation to perform those functions when they are needed.

b. The *particular* assumption of control over rescue operations in this case obligated the Coast Guard to carry out its duty to search and rescue. When Miami RCC first received the SEA BOY II's MAYDAY call, it placed the SEA BOY II in a "distress" category and began taking steps for search and rescue operations. The officer in charge at Miami RCC acknowledged in his testimony that he had assumed jurisdiction over the distress, becoming the SMC (SAR Mission Controller), by *no later than 8:55 p.m.*, about 40 minutes after receipt of the MAYDAY. The RCC message traffic from at least that point shows all other Coast Guard stations, as well as the Bahamas Air Sea Rescue Service, going to Miami RCC with

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(footnote continues)

656-57 (S.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 830 (2d Cir. 1977); *and see* 46 U.S.C. §726:

> "The master or person in charge of a vessel shall, so far as he can do so without danger to his own vessel, crew or passengers, render assistance to every person who is found at sea in danger of being lost. . ."

information, and for status reports or possible instructions involving the case. The Coast Guard's control over the rescue effort is also demonstrated by the relations between Miami RCC and the two merchant vessels that had relayed the calls for help, and its action in releasing those vessels from further involvement in the case. This act of authority and direction over the merchant vessels demonstrates the level of control the Coast Guard was exercising, and understood as exercising by those vessels: both vessels contacted the Coast Guard, acted pursuant to the brief instructions given, and finally, were officially released of their own rescue obligations by the Coast Guard SMC. Although the district court concluded that these actions did not actually worsen the position of those aboard the SEA BOY II, the actions do signify assumption of control by the Coast Guard over search and rescue activity. Once control was assumed, the duty of care was established.

The Coast Guard's assumption of control—in this particular situation and over maritime search and rescue efforts generally—requires, under the principles of *Indian Towing*, that a duty of due care, to perform this function as and when needed, should be recognized and imposed upon the Coast Guard. Implication of such a duty is in accordance with the decision in the *Gavagan* case, but would require revision of the decision below in the case at bar.

* * *

As shown above, there is abundant authority in support of the implication of a duty to rescue. Moreover, implication of such a duty would further advance the liberal and humanitarian principles traditional to admiralty jurisdiction and its "special solicitude for those who are injured within its jurisdiction," *Sea Land Services v. Gaudet*, 414 U.S. 573, 588 (1974); *see also Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970). Petitioners submit that a duty reasonably to attempt rescue in proper circumstances, such as those presented in the case at bar, should be imposed upon the Coast Guard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2198 September Term, 1980

Civil Action No. 76-1080

JAMES R. MAZZULLO, *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the District of Columbia.

Before: McGOWAN, EDWARDS and GINSBURG, Circuit Judges

MEMORANDUM

In December of 1973, the *Sea Boy* II, a fifty-three foot cabin cruiser manufactured by defendant Chris-Craft Industries, Inc. and owned by defendant Eleanor Baldwin, was lost at sea with all hands in the Bahamas. The owner, on December 5, 1975, filed in the District Court a complaint for exoneration from, or limitation of, liability. Two weeks later the administrator of the estates of the eight decedents sued in the United States District Court for the District of Maryland, claiming damages from Chris-Craft for negligent design, from Baldwin for allowing navigation of an unseaworthy vessel, and from the United States for allegedly negligent acts or omissions in the matter of rescue operations. This latter suit was transferred from Maryland to the District Court in this Circuit, and was thereafter consolidated with the exoneration suit.

The claims against the builder and the owner were settled before trial. The continuing suit against the United States was tried to the court without a jury, resulting in a judgment of no liability. On appeal, apart from one allegedly erroneous evidentiary ruling, appellants essentially argue that the Coast Guard made no reasonable attempt to rescue the decedents.

We have examined the full record in the District Court, including the findings of fact made by it; and we conclude therefrom that we are without warrant to disturb the decision of that court granting judgment in favor of the United States. Plaintiff-appellants argued that the Coast Guard had a legal duty, running to the voyagers on the ill-fated *Sea Boy* II, to do all things reasonably required to make a meaningful attempt to rescue them. We do not reach the question whether such a duty exists. It suffices to point out that we find no error in the District Court's conduct of the trial and, after reviewing the entire record, we find no basis for a determination that the Coast Guard acted unreasonably. The fact findings made by the District Court preclude a judgment that the Coast Guard's handling of the matter was irresponsible or outside the bounds of the considerable discretion it assuredly must have to determine its course of conduct when information is meager and conditions shifting and uncertain.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1080

JAMES R. MAZZULLO, *et al.*,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Defendants.

Civil Action No. 75-2038

IN THE MATTER OF THE COMPLAINT OF ELEANOR M. BALDWIN, OWNER OF THE CABIN CRUISER "SEA BOY II" FOR EXONERATION FROM OR LIMITATION OF LIABILITY

MEMORANDUM AND ORDER

I. Preliminary Statement

These consolidated cases arise from the final voyage of the Sea Boy II (Sea Boy), a fifty-three foot cabin cruiser, manufactured by the defendant, Chris-Craft Industries, Inc. (Chris-Craft) and owned by the defendant Eleanor Baldwin.

On December 19, 1973, Sea Boy departed Freeport in the Bahama Islands bound for Nassau. Eight individuals allegedly were aboard, namely; Michael Baldwin, Thomas and Kathleen Mazzullo,and Richard and Nancy Mazzullo and their three minor children (the decedents).

Sea Boy never reached Nassau. The wreck of Sea Boy was discovered on December 24, 1973, by the United States Coast Guard (Coast Guard) in some thirty feet of water off Market Fish Cay in the central Berry Islands. No trace of Sea Boy's passengers has ever been found.

On December 5, 1975, Eleanor Baldwin, owner of Sea Boy filed in this Court a complaint for exoneration from or limitation of liability under the provisions of 46 U.S.C. §§181-195 (the limitation suit).

On December 19, 1975, the administrators of the estates of the eight decedents filed Civil Action 76-1080 in the United States District Court for the District of Maryland pursuant to the Death on the High Seas Act (DOHSA), 46 U.S.C. §761-768 (the DOHSA) complaint). By Court Order dated June 10, 1976, the DOHSA complaint was transferred to this Court and subsequently consolidated with the limitation suit.

In the DOHSA complaint, plaintiffs allege (1) that the defendant Chris-Craft negligently designed Sea Boy; (2) that Eleanor Baldwin[1] allowed the decedents to navigate Sea Boy, knowing that it was an unseaworthy vessel; and (3) that the United States, through the actions of the Coast Guard, negligently conducted unsuccessful rescue operations for Sea Boy.

Additionally, the plaintiffs[2] filed claims against Eleanor Baldwin in the limitation suit.

The claims of the plaintiffs against Baldwin and Chris Craft were subsequently compromised and settled. The remaining negligence claim against the Government was tried to the Court, without a jury.[3] As to the latter, the Court concludes that the plaintiffs have failed to satisfy their burden of proof.

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[1] H. Gabriel Baldwin, husband of Eleanor Baldwin, was originally named a defendant in the DOHSA complaint. However, he was subsequently dismissed from the case when it was determined that he had no ownership interest in Sea Boy.

[2] The administrator of the estate of Michael Baldwin did not join in filing claims in the limitation suit.

[3] The Court has jurisdiction of this action pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. §§741 et seq. and the Death on the High

(footnote continued)

Pursuant to Fed. R. Civ. P. 52(a), there follow the Court's Findings of Fact and Conclusions of Law relevant to that conclusion.

II. Findings of Fact

1. The Sea Boy was a wooden hulled vessel. Its principal characteristics were:

> Overall length—53′ 7″—beam—14′ 6″ displacement—approximately 35,000 lbs. engines—2 671 GM diesels (235 H.P. each); speed—maximum speed 21.3 est; cruising speed 14 est.; estimated cruising range—245 miles; draft—36¼″; freeboard—83″ forward; 74½″ aft; cabin deck above waterline—14′ 11″.

See plaintiffs' Ex. 1.

2. On the morning of December 19, 1973, the Sea Boy left Freeport for its intended destination of Nassau, on the last leg of a voyage originating in the Washington, D.C. metropolitan area.

3. Allegedly on board at the time were eight persons, namely, Richard Mazzullo and his wife Nancy and their three children, Robin Ann (age 10), Anthony John (age 7), and Matthew Christian (age 2); Thomas William Mazzullo and his wife Kathleen; and Michael Baldwin.

4. The activities of those aboard Sea Boy and the location of the vessel during the day of December 19, 1973 are unknown.

5. On December 20, 1973, beginning around 1:30 p.m. and continuing until late in the afternoon, a series of approximately twelve radio transmissions originating from a vessel identifying itself as Sea Boy were monitored by Harold Irr, who was

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(footnote continues)

Seas Act, 46 U.S.C. §§761 et seq.; and this is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. With consent of the parties, evidence was received only on the issue of the Coast Guard's liability, with the question of damages reserved for later consideration, if appropriate.

manning a radio in the Crown Colony Club located at Chubb Cay, at the southern end of the Berry Islands.[4] The radio transmissions requested information from anyone within hearing range concerning weather and sea conditions between the Berry Islands and Nassau. During the transmissions, those aboard Sea Boy indicated uncertainty as to their location, but they did not state that the boat was in an emergency situation.

6. Nothing further is known of the activities of Sea Boy until the SILBA, a Yugoslavian tanker, received two garbled MAYDAY radio calls from a vessel identifying itself as the Sea Boy. The calls were received at 8:05 and 8:10 p.m. on December 20, 1973. The calls were received on Channel 16, VHF-FM, the emergency VHF channel, designed for short range, line of sight communications.

7. The SILBA interpreted the transmissions to state something to the effect of "MAYDAY. Sea Boy 2 Two Miles East of Whale Cay.", see plaintiffs' Ex. 2. The SILBA, although it attempted to do so repeatedly, could not establish 2-way communications with Sea Boy.

8. The SILBA relayed the Sea Boy's MAYDAY message to all ships and stations on 500 KHZ, a Morse Code frequency. During the period of 8:10 p.m. to 8:18 p.m. various Coast Guard radio and communication stations received portions of the SILBA's transmissions.

9. At 8:17 p.m. the Coast Guard's Rescue Coordination Center (RCC) for the Seventh Coast Guard District at Miami, Florida, received a call from Coast Guard Radio Station, Miami (Radsta, Miami) wherein Radsta, Miami advised the RCC that a MAYDAY had been received and inquired as to the location of Whale Cay. The RCC informed Radsta, Miami that there were two Whale Cays in the Seventh Coast Guard District and asked the Radsta "what's identification and problem?". Radsta, Miami replied that it did not know the nature of

[4] The Berry Islands are a horseshoe-shaped chain of islands in the western Bahamas, running in a generally north to south direction, and approximately 30 miles in length.

the problem and that it could not establish communications with the SILBA, see plaintiffs' Ex. 13(a) at p. 1.

10. At 8:21 Radsta, Miami notified RCC, New York that two Whale Cays existed, see plaintiffs' Ex. 6 at p. 2.

11. Until 9:44 p.m. on December 20, 1973, the SILBA did not acknowledge any communications from the Coast Guard but it did continue to send her relay of Sea Boy's distress message, see plaintiffs' Ex. 6 at pp. 2 and 4. At no time did the SILBA alter her course so as to proceed to the distress location indicated in the Sea Boy's messages.

12. At 8:20 p.m. the Communications Station at Portsmouth, Virginia noted that it was unsuccessfully trying to establish communications with the SILBA.

13. During the attempts to communicate with the SILBA, Radsta, Miami did notify RCC, Miami that the SILBA was relaying for "vessel Seabouy 2 [sic] who is in distress 2 miles east of Whale Cay"; and that Radsta could not communicate with the SILBA, see plaintiffs' Ex. 13(a) at p. 1.

14. At 8:54 p.m. RCC Miami attempted to call the Bahamian Air and Sea Rescue Association in the Bahamas (BASRA). Initially efforts were unsuccessful but contact was finally established at 9:12 p.m. when RCC briefed BASRA. BASRA indicated that it had no information about Sea Boy, but that it would try to contact the vessel on radio frequency 2182 and Channel 16. At 10:15 p.m. BASRA informed RCC, Miami that its efforts to contact Sea Boy were unsuccessful, see plaintiffs' Ex. 13(a) at p. 3.

15. At 8:55 p.m. RCC, Miami contacted the Federal Communications Commission (FCC) to secure information about Sea Boy. The FCC gave RCC Miami the names of two previous registered owners of Sea Boy in southeast Florida. RCC thereafter attempted to contact the owners, but received no relevant information, see plaintiffs' Ex. 13(a) at p. 2. Further requests of the FCC were made at a later time, see plaintiffs' Ex. 13(a) at p. 5.

16. At 9:25 p.m. on December 20, 1973, RCC Miami decided not to launch any vessels or aircraft in search of Sea Boy until the morning of December 21, 1973. This decision was communicated to Captain Shaw, Chief of Search and Rescue for the Seventh Coast Guard District and he concurred, see plaintiffs' Ex. 13(a), and Shaw Deposition at pp. 74-83.

17. Further communication difficulties and confusion developed at about 10:30 p.m. when the CORNISH WASA (WASA), a British merchant vessel, began to relay SILBA's transmissions, which, as indicated *supra,* were in turn merely relays of Sea Boy's abbreviated distress messages, originally received by the SILBA at 8:05 and 8:10 p.m. Neither the SILBA nor the WASA were successful in communicating with the Sea Boy at any time.

18. At 10:37 p.m. the WASA informed the Coast Guard that it was in an electrical storm. The Coast Guard requested the WASA to standby for communication, see plaintiffs' Ex. 6 at p. 10.

19. At 10:55 p.m. RCC Miami was informed of the WASA's position off the coast of and east of Great Abaco Island, see plaintiffs' Exhibits 6 at p. 10; 13(a) at p. 4; and 39.

20. At 11:49 p.m. RCC Miami noted that the WASA did not know the nature of Sea Boy's distress and was not proceeding to the reported location, see plaintiffs' Ex. 6 at pp. 19-20.

21. At about 11 p.m. the SILBA transmitted her position as 20 miles Northeast of Abaco light, see plaintiffs' Exhibits 6 at p. 13; and Exhibit 39.

22. The Coast Guard continued to experience difficulties in communicating with the SILBA and WASA.

23. At 11:57 p.m. on December 20, 1973, the WASA was released by the Coast Guard from her communications standby. WASA informed the Coast Guard that it was closing down its communications watch but that it would continue to monitor Channel 16, see plaintiffs' Ex. 6 at p. 20.

24. At 12:22 p.m. the Coast Guard released the SILBA from her communications standby, see plaintiffs' Ex. 6 at p. 21.

25. At 1:00 a.m. on December 21, 1973, RCC Miami notified the Commander of the Atlantic Area that:

> [We] [d]on't plan action at all yet. Will sit on it and see what BASRA can get on it in A.M. After weather clears[5] Don't plan traffic.

see plaintiffs' Ex. 13(a) at p. 4.

26. At 4:00 a.m. on December 21, 1973, a MAYDAY call was received from the vessel EARLINE, a 48 foot lobster boat. The Coast Guard established direct communications with the EARLINE and determined her position and distress situation. A HH52 helicopter and a HU16 fixed wing aircraft were ordered launched immediately. They departed the Coast Guard Air Station at Opolocka, Florida at 4:56 a.m. and 5:00 a.m. respectively on December 21, 1973.

27. After completion of the EARLINE mission, the HU16, under the command of Cdr. Pell, was diverted to search the areas of the two Whale Cays for Sea Boy. The search of the Whale Cays was completed by 10:00 a.m. At 10:20 a.m. RCC Miami briefed BASRA and the search for Sea Boy was interrupted pending further information, see plaintiffs' Ex. 13(a) at p. 5 and Shaw Deposition at p. 222.

28. At 7:10 p.m. on December 21, 1973, BASRA informed RCC Miami that Eleanor Baldwin had reported the Sea Boy overdue on a trip from Freeport to Nassau.

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[5] Much evidence was introduced by both parties at trial concerning the presence of a cold front and its preceding squall line, with associated severe thunderstorm activity, in and around Sea Boy's supposed location. The Coast Guard asserts that these severe weather conditions were an important factor in its decision not to dispatch planes or ships immediately to search for Sea Boy. On the other hand, the plaintiffs argue that the Coast Guard improperly failed to determine the actual weather conditions prevailing at either of the two Whale Cays. Our conclusions, *infra*, concerning the duty of the Coast Guard to Sea Boy renders it unnecessary to decide this issue on a record particularly lacking in desired clarity.

29. The Coast Guard resumed its search and the remains of Sea Boy were discovered at 11:20 a.m. on December 24, 1973, at anchor and sunk 200 feet east of Rock Island North of Holmes Cay in approximate position 25-40°N, 77-44°W, see plaintiffs' Ex. 30.

III. Conclusions of Law

To prevail against the Coast Guard, the plaintiffs must establish, by a preponderance of the evidence, the oft-defined elements of negligence, *viz.* (1) the existence of a duty owed by the Coast Guard to the decedents; (2) a breach of that duty; (3) the deaths of the decedents[6] and (4) a causal relationship between the Coast Guard's conduct and the decedents' deaths. *See* Restatement of Torts 2d, §§ 281-328; Prosser Torts 4th Ed., §30 at p. 143.

We conclude that the plaintiffs have failed to demonstrate the existence of (1) a legal duty on the part of the Coast Guard to aid the Sea Boy and (2) the requisite proximate causation between the alleged failure of the Coast Guard to respond and the Sea Boy's demise.

(A) *The Statute*

Congress charged the Coast Guard with statutory responsibility.

> . . . [to] develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; . . . . 14 U.S.C. §2.

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[6] No issue has been raised as to actual proof of the deaths of Sea Boy's passengers. By Court Order dated March 29, 1976, the Circuit Court for Virginia Beach, Virginia, declared the members of the Richard Mazzullo family to be dead, see plaintiffs' Ex. 24. The Court assumes that all of Sea Boy's passengers met their deaths on or about December 20, 1973.

With particular reference to assisting distressed persons or vessels, Congress declared that the Coast Guard *may*

> (1) perform any and all acts necessary to rescue and aid persons and protect and save property . . .
>
> (b) [T]he Coast Guard *may render aid* to persons and protect property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized. 14 U.S.C. §88. (emphasis supplied)

(B) *The Duty*

Other courts in different settings have recognized the permissive quality of the statutory language recited above, and accordingly have ruled that there is no pre-existing legal duty on the Coast Guard to provide rescue services on demand. *See Kelly v. United States,* 531 F.2d 1144, 1147 (2d Cir. 1976); *Wellington Transportation Company v. United States,* 481 F.2d 108, 110 (6th Cir. 1973); *United States v. Sandra & Dennis Fishing Corp.,* 372 F.2d 189, 195 (1st Cir. 1967); *United States v. Devane,* 306 F.2d 182, 186 (5th Cir. 1962); *United States v. Gavagan,* 280 F.2d 319, 328 (5th Cir. 1960); *Frank v. United States,* 250 F.2d 178, 180 (3rd Cir. 1957); *P. Daugherty Co. v. United States,* 207 F.2d 626, 634 (3rd Cir. 1953); *Foltting v. Kaevando,* 324 F.Supp. 585, 587 (S.D. Tex. 1971); *Lacey v. United States,* 98 F.Supp. 219, 220 (D. Mass. 1951); and *see generally United States v. Lawter,* 219 F.2d 559 (5th Cir. 1955).[7]

Relying on the above precedent, the Government argues that the actions of the Coast Guard fall within the ambit of the "Good Samaritan" doctrine, *see* Restatement of Torts 2d, §§323-324; *United States v. Devane, supra,* and that the Coast Guard did not contravene the standard of conduct prescribed

[7] Neither does the existence of the National Search and Rescue (SAR) plan, see plaintiffs' Ex. 11, and the regulations implementing it, see plaintiffs' Ex. 12, impose any pre-existing legal duty on the Coast Guard. In Re American Oil Company, 417 F.2d 164, 170 (5th Cir. 1969); see generally Thompson v. United States, 592 F.2d 1104, 1110 (9th Cir. 1979).

by the doctrine which requires only that the volunteer not worsen the condition of the victim.

The plaintiffs, while not directly challenging the validity of the government's interpretation, contend that in this instance the Coast Guard did actively assume a duty to the passengers of Sea Boy in that (1) the Coast Guard caused the decedents to rely to their detriment on Coast Guard representations as to available rescue services and (2) the Coast Guard foreclosed to the decedents other avenues of escape by taking charge of the Sea Boy rescue operation and subsequently conducting that operation in such manner as to worsen the plight of the decedents, *see* Restatement of Torts 2d, §324.

To support their contentions, the plaintiffs point to three separate actions of the Coast Guard, *viz.* (1) the establishment of the Rescue Coordination Center at Miami, Florida with its available facilities and equipment; (2) the assumption of direction of the search for Sea Boy without advising that the RCC was not sending out rescue equipment; and (3) the release of the SILBA and CORNISH WASA without providing alternative rescue facilities. We consider each argument below.

(1) *RCC, Miami*

The plaintiffs attempt to place this case within the purview of *Indian Towing Co. v. United States,* 350 U.S. 61 (1955) and its progeny. In *Indian Towing,* the Supreme Court weighed the propriety of attributing responsibility to the Coast Guard for the grounding of a private vessel resulting from the malfunctioning of a lighthouse operated by the Coast Guard. Citing the well-settled principle that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner," the Court concluded:

> *The Coast Guard need not undertake the lighthouse service.* But once it exercised its discretion to operate a lighthouse on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light

> did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

at p. 69 (emphasis supplied); *see also Rayonier, Inc. v. United States*, 352 U.S. 315 (1956).

Taking their cue from the foregoing language, plaintiffs argue that once having exercised its discretion to provide rescue facilities, the Coast Guard was bound to respond to each call of maritime distress.

However, the Court finds *Indian Towing* to be factually inapposite to the instant case. Significant differences exist between the Coast Guard's active operation of a lighthouse, specifically intended to control navigation, and the maintenance of rescue equipment for possible assistance to ships in distress. In *Indian Towing* it is clear that the Coast Guard placed the damaged vessel in a position of dependence upon the continued, competent operation of the lighthouse to assure the ship's safe passage. And it was the malfunctioning of the lighthouse which caused the damages suffered.

Those factors are not present in this case. The plaintiffs here have failed to demonstrate (1) that the decedents were motivated to pursue a particular course of action either prior to or during their period of distress by the existence of Coast Guard rescue facilities or (2) that the Coast Guard made specific representations to the decedents (a) that they should seek assistance from the Coast Guard to the exclusion of all other sources or (b) that rescue equipment would be made available upon mere demand without reservation.

With particular reference to (2) *supra*, the plaintiffs urge the Court to find that the following comments of the Coast Guard in its "Official Recreational Boating Guide" represent a commitment to aid the distressed boater in all situations:

> Search and Rescue (SAR) is one of the many services the Coast Guard provides the mariner in its overall objective of promoting safety afloat. It is

much better to prevent accidents before they happen. When they do and help is needed, Coast Guard Rescue Coordination Centers *are prepared to coordinate* assistance efforts in your behalf.

Keep in mind that Coast Guard assistance is not always the most readily available; frequently other pleasure or commercial craft are in position to render more timely assistance. The seagoing tradition of proceeding with all possible haste to assist persons in distress applies to the boatman as well as the professional seaman.

In general, the SAR responsibilities of the Coast Guard are limited to the high seas and navigable water of the United States, although facilities *may be dispatched wherever available.* Services provided *may include* conducting harbor checks and searches for missing craft, effecting emergency repairs, towing to the nearest port or safe anchorage, and furnishing emergency medical assistance or evacuation, depending on the circumstances of the individual case. Primary consideration is given to the saving of life. Plaintiffs' Ex. 40 at p. 4 (emphasis supplied).

We disagree with the plaintiffs' characterizations and assumptions. We believe the above language serves as an explicit reminder to the would be sea-farer that he should not venture blindly into unfamiliar waters, armed with the simple faith that the Coast Guard will extricate him from his self-made dilemmas, whenever and wherever those occur.

In short the Court finds absent here that degree of affirmative action by the Coast Guard, present in *Indian Towing*, on which the decedents were forced to rely for their well-being, *see United States v. Sanders and Dennis Fishing Corp., supra.* [8]

---

[8] For the same reason, we find plaintiffs' reliance on the so-called "air traffic controller cases," i.e. Union Trust Co. of District of Columbia v. United States, 113 F. Supp. 80 (D.D.C. 1953), aff'd sub nom. Eastern Air Lines v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955) and its progeny, to be misplaced.

(2) *Conduct of Search*

Plaintiffs argue alternatively that the Coast Guard "assumed control" of the Sea Boy search and then proceeded to conduct that search negligently, in particular by releasing the SILBA and WASA from going to the aid of the Sea Boy as required by international maritime law. We do not believe the facts bear out the plaintiffs' contentions.

First, the record clearly reflects that at no time did either RCC, Miami or any other Coast Guard facility succeed in establishing direct communications with Sea Boy, despite repeated efforts to do so. Consequently no representations were ever made to Sea Boy's passengers concerning any rescue efforts to be undertaken by the Coast Guard.

Secondly, we believe the plaintiffs torture the facts by asserting that the Coast Guard took charge of search operations. The record reveals initial confusion and uncertainty by all participants in the Sea Boy search, as a result of the meager information in hand and the difficulty of sustained communications. Instead of sending rescue forces out blindly to an unknown situation, RCC, Miami determined to gain additional information, hopefully to clarify the nature of the distress and in the end to facilitate the search.

Perhaps, in hindsight, some Coast Guard personnel other than those on duty on the night of December 20th might have taken other steps and launched an immediate sea-air rescue mission. But, we are dealing with discretion and judgment and we cannot in the circumstances of this case fault the judgment of those on duty to the point of declaring a violation of a legal responsibility on the part of the Coast Guard to the decedents.

Finally the plaintiffs have failed to prove to the Court's satisfaction that the Coast Guard's participation in this incident dissuaded any would-be rescuer from proceeding, timely, to the Sea Boy.

In that regard we note first that upon reception of Sea Boy's MAYDAY message, the SILBA made no effort to change its course to render assistance to the Sea Boy. Rather the

SILBA continued on her predetermined course while broadcasting to all ships and stations a message indicating its reception of the Sea Boy MAYDAY. More than 1 and 1/2 hours passed before the Coast Guard finally succeeded in establishing some semblance of radio communications with the SILBA. Nothing prevented the SILBA during this period of time from independently proceeding to Sea Boy's purported location, although the paucity of information and continued radio silence of Sea Boy were certainly factors mitigating against such action. Moreover, the Coast Guard did not receive independently any additional information from other sources further specifying the source or location of Sea Boy's troubles so as to place it on notice as to the possible assistance to be rendered by the SILBA.

A similar situation existed as to the WASA. The WASA did not appear on the scene until some two hours after the receipt of Sea Boy's MAYDAY. It, too, was never in direct contact with the Sea Boy; it was only relaying the SILBA's messages to the Coast Guard. WASA, as well, made the independent decision not to proceed to Sea Boy's location because it did not know the nature or location of the distress.

In short the SILBA and WASA proceeded on their voyages and left to the Coast Guard the decision as to what action to take. These ships were not diverted, nor were any rescue operations on their parts thwarted by the Coast Guard.

In light of the information available to the Coast Guard, the Court cannot find that the Coast Guard's refusal to order the merchant vessels to alter their courses and proceed to the Sea Boy's suspected location constitutes such improper action to render the Coast Guard liable.

Equally significant, the plaintiffs have failed to demonstrate that diverting the SILBA or WASA would have resulted in successful rescue of the Sea Boy, as discussed more fully below.

(C) *Proximate Cause*

Even if we have erred in our prior conclusions, the Court would nevertheless hold the Coast Guard harmless in this

instance for lack of sufficient direct and circumstantial evidence to relate Sea Boy's demise to any action of the Coast Guard.

Simply stated, the loss of the Sea Boy remains shrouded in mystery. Violent weather, inexpert seamanship, poor structural maintenance and other more exotic theories have all been advanced as the catalysts in the loss of Sea Boy. The extent to which each may indeed have contributed to Sea Boy's end will never be known.

Even less can be inferred as to the fate of Sea Boy's passengers. The Court can but only speculate on the answers to questions crucial to plaintiffs' claims, among them (1) the true condition of Sea Boy at the time of its MAYDAY message; (2) the factors which prompted Sea Boy's message of distress; (3) the number of Sea Boy's passengers alive at the time of the messages; and (4) whether those remaining passengers survived 10 minutes or 10 hours after the transmission of the MAYDAYS.[9]

Consequently, as trier of the fact, the Court concludes that the plaintiffs have failed to establish that the alleged misconduct of the Coast Guard was a substantial factor in worsening the plight of the decedents.

(D) ***Conclusion***

> The cause of this unfortunate accident has not been resolved factually. It cannot be resolved legally. *Merrill Trust Company v. Bradford,* 507 F.2d 467, 471 (1st Cir. 1974).

For that reason, it is this 8th day of August, 1979,

---

[9] On that score, plaintiffs proffered evidence of the sighting of a flare and the reception of an autoalarm, on radio frequency 2182, both approximately one hour after Sea Boy's MAYDAY. However, the plaintiffs have failed by a wide margin to establish any nexus between those events and Sea Boy. The Court must conclude that what plaintiffs characterize as rational inferences amount only to speculation and conjecture.

ORDERED that judgment should be, and the same hereby is, entered in favor of the defendant, the United States of America, and against the plaintiffs as to the plaintiffs' complaint.

/s/ HOWARD F. CORCORAN

Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2198 September Term, 1980

Civil Action No. 76-1080

JAMES R. MAZZULLO, *et al., Appellants*

v.

UNITED STATES OF AMERICA

Appeal from the United Stated District Court for the District of Columbia.

Before: MCGOWAN, EDWARDS and GINSBURG, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam

FOR THE COURT

GEORGE A. FISHER

Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2198 September Term, 1980

Civil Action No. 76-1080

JAMES R. MAZZULLO, *et al., Appellants*

v.

UNITED STATES OF AMERICA

Before: McGOWAN, Chief Judge, WRIGHT TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG; Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been transmitted to the full court and no Judge has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that appellants' suggestion is denied.

FOR THE COURT:

GEORGE A. FISHER, Clerk

By: ROBERT A. BONNER

Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2198 September Term, 1980

Civil Action No. 76-1080

ARGUED: 11-19-80

JAMES R. MAZZULLO, *et al., Appellants*

v.

UNITED STATES OF AMERICA

Before: McGOWAN; Chief Judge, EDWARDS and GINSBURG; Circuit Judges

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

By ROBERT A. BONNER

Robert A. Bonner
Chief Deputy Clerk

APPENDIX E

SUITS IN ADMIRALTY ACT

46 U.S.C. 742. LIBEL IN PERSONAM

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

DEATH ON THE HIGH SEAS ACT

46 U.S.C. 761. RIGHT OF ACTION; WHERE AND BY WHOM BROUGHT

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may

maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

COAST GUARD

14 U.S.C. 2. Primary Duties

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws upon the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on the high seas and on waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on and over the high seas and waters subject to the jurisdiction of the United States; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war.

14 U.S.C. 88. Saving Life and Property

(a) In order to render aid to distressed persons, vessels, and aircraft on the high seas and on waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

APPENDIX F

CONVENTION ON THE HIGH SEAS, 13 U.S.T. 2314

ARTICLE 12

1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers,

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him;

* * *

INTERNATIONAL CONFERENCE FOR THE SAFETY OF LIFE AT SEA OF 1960, 16 U.S.T. 185

REGULATION 10

Distress Messages—Obligations & Procedures

(a) The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress.

(b) The master of a ship in distress, after consultation, so far as may be possible, with the masters of the ships which answer his call for assistance, has the right to requisition such one or more of those ships as he considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

REGULATION 15

Search and Rescue

(a) Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coast. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons.

(b) Each Contracting Government undertakes to make available information concerning its existing rescue facilities and the plans for changes therein, if any.

APPENDIX G

EXECUTIVE ORDER 11239—ENFORCEMENT OF THE CONVENTION FOR SAFETY OF LIFE AT SEA, 1960 (July 31, 1965)

WHEREAS under Article I of the International Convention for Safety of Life at Sea, signed at London on June 17, 1960, ratified by the United States of America, and proclaimed by the President on March 24, 1965 (TIAS 5780), hereinafter sometimes referred to as the Convention, the Government of the United States of America, together with the governments of the other countries which have become parties to the Convention, undertakes to give effect to the provisions of the Convention and of the Regulations annexed thereto, to promulgate all laws, decrees, orders, and regulations, and to take all other steps which may be necessary to give the Convention full and complete effect, so as to insure that, from the point of view of safety of life, a ship is fit for the service for which it is intended; and

WHEREAS it is expedient and necessary, in order that the Government of the United States of America may give full and complete effect to the Convention, that several departments and agencies of the Executive Branch of the Government perform functions and duties thereunder; and

WHEREAS, in accordance with Article XI thereof, the Convention came into force on May 26, 1965:

NOW, THEREFORE, by virtue of the authority vested in me by Section 301 of Title 3 of the United States Code and as President of the United States of America, it is ordered as follows:

Section 1. The Secretary of State, the Secretary of the Treasury (acting through the Coast Guard), the Secretary of Commerce (acting through the Weather Bureau), and the Federal Communications Commission, respectively, are hereby directed, in relation of the fulfillment of the obligations undertaken by the Government of the United States of America under the Convention, to perform the functions and duties

therein prescribed and undertaken which appertain to the functions and duties which they severally are now authorized or directed by law to perform. Each of the Secretaries and the Commission shall cooperate and assist the others in carrying out the duties imposed by the Convention and by this order.

* * *

APPENDIX H

NATIONAL SEARCH & RESCUE MANUAL

743 DISTRESS PHASE (emphasis in original)

The distress phase is assigned anytime immediate assistance is required by a craft or person because of being threatened by grave and imminent danger, or because of continued lack of information concerning progress or position. The key words are *grave danger* and *immediate assistance.*

783 ACTIONS DURING THE DISTRESS PHASE

(a) Until such time as the responsible SAR coordinator designates another officer of his own service or another agency as SMC, the RCC controller prosecuting the incident to this point shall continue to act as SMC.

(b) Type and number of SAR units to be used is determined. SRU crews are briefed and SRUs dispatched.

(c) Secondary SAR facilities, rescue teams, other personnel, and assisting agencies are alerted, if not already accomplished.

(d) The base of departure is notified that an aircraft which has departed from that base has been declared "missing."

(e) Radio stations and en route aircraft are requested to maintain listening watches on specified frequencies for possible transmissions from the missing aircraft or personnel.

(f) The operating agency of the missing aircraft is kept advised of SAR system response.

(g) The SAR mission is planned and carried out in accordance with the principles in subsequent chapters of this manual.

(h) If the craft in distress is of foreign registry, the state of registry shall be notified through the most appropriate means available. In the case of aircraft, aeronautical communications channels or SAR circuits are usually the most rapid means. In

the case of surface craft, notification of the nearest consular authorities of the state of registry of the ship is generally satisfactory. Diplomatic channels can be used if necessary.

(i) If the incident consists of an accident requiring investigative action, the appropriate accident investigation authorities shall be notified.

ANNEX "I"

COAST GUARD 7TH DISTRICT OPERATION PLAN

1. General Situation.

a. The Miami SAR Plan, Annex "I" of Seventh Coast Guard District Operation Plan No. 1-(YR), provides for search and rescue operations within the Seventh Coast Guard District. It supports the National Search and Rescue Plan and SAR agreements between higher echelons.

* * *

g. SAR agreements between Commander, Seventh CG District and the Governments of Jamaica and the Bahama Islands permit Coast Guard vessels and aircraft which are engaged in urgent SAR to enter or fly over the territorial land and waters of these countries without obtaining formal clearance. Prior notification of entry however, is required. The Government of the Bahamas does desire clearance be requested for extended search operations.

* * *

APPENDIX I TO ANNEX "I"

2. Objective. The Miami SAR Plan provides an over-all Search and Rescue Plan for the effective utilization of SAR facilities, both military and civilian, in the Seventh Coast Guard District. This Plan is promulgated for the guidance and action of the Seventh Coast Guard District Group and Unit Commands and for the guidance and cooperation of all agencies having a SAR potential in the Seventh Coast Guard District. The Plan is the basic operating plan for Search and Rescue and contains policies and procedures for the conduct and coordination of SAR activities in the Miami SAR Sub-Region.

5. Basic SAR Action Required in Each Distress Incident.

a. Any command or individual having knowledge of a distrss (*sic*) should immediately advise the Miami SAR Coordinator (COGDSEVEN) or the nearest Coast Guard unit and should take all reasonable measures to render assistance.

b. Coast Guard units will promptly report to the Miami RCC all SAR incidents and take prompt action to render assistance within the capabilities of available personnel and equipment and shall keep the Miami SAR Coordinator (COGDSEVEN) advised of the case by situation reports (SITREPS).

c. SAR Mission Coordinators, as designated under Task-Organization, when receiving initial notification of a SAR incident, will assume control until a specific SMC is designated. Control of the case must be clearly indicated. If such is not apparent, the Miami SAR Coordinator shall be requested to designate control.

6. Specific Actions Required. The activity controlling the SAR incident (Miami SAR Coordinator or designated SAR Mission Coordinator) will take the following actions as soon as information is received that a SAR incident exists.

* * *

c. *Distress Phase*

(1) Dispatch personnel and equipment in a coordinated effort to locate and rescue persons and property in distress.

(2) Initiate action in accordance with established doctrine and detailed SAR plans including the following:

(a) Determine most probable location of the distress incident by all available means.

(b) Determine on scene weather.

(c) If a prolonged search is indicated, determine the extent of the search and assign search areas to available units by means of a coordinated search plan.

(d) Designate On-Scene-Commander, if necessary.

(e) Request additional SAR facilities as deemed necessary to augment primary SAR facilities.

(f) Initiate ALL SHIPS broadcasts if conditions warrant and determine ships in area from AMVER and CINCLANFLT as deemed necessary.

(g) Notify agency or source of orginal (*sic*) distress information of the action taken, developments and termination of the case. Send SITREPS in accordance with established procedures.

* * *

APPENDIX VI TO ANNEX "I"

2. Assistance to persons, vessels, and aircraft; basic policy

b. *Assistance to persons:*

(1) *Basic policy:* Coast Guard units will exert every effort to rescue persons from positions of peril regardless of location, where within the unit's physical and geographical capability to do so. Saving of human life shall be the prime object of any SAR mission; saving of property shall be secondary to this.

* * *

c. *Assistance to vessels:*

(1) In cases falling within the scope of Title 14, USC 88, it is incumbent upon the nearest Coast Guard unit to proceed towards a vessel which has requested assistance, a vessel which has issued a distress call or a vessel which is obviously in need of assistance. Although the Coast Guard will not compete with private or commercial enterprise in rendering assistance, it cannot rely on private or commercial enterprise to render assistance in low order cases and itself act only when extreme jeopardy exists. Even though reliable information is received that private or commercial assistance is proceeding toward the scene there is no assurance that it will complete the mission until such assistance is actually known to be on scene or to have the situation in hand. Until that time the Coast Guard must have its units proceed toward the scene. When information received after the initial report is of such a nature that it is evident that distress did not exist or no longer exists, those units ordered to the scene can be recalled.

* * *

MEMO FROM MIAMI CHIEF OF SEARCH AND RESCUE

MEMO OF 26 JUNE 1972

SAR Procedures; dispatching of units

1. Never hesitate to dispatch a SAR unit. You will never be criticized for taking positive action. The greatest sin we can commit is not taking action when we should. If you are in doubt about sending a unit, resolve the problem in the customer's favor; send something.

* * *

Office-Supreme Court, U.S.
FILED
JUN 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1719

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES R. MAZZULLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Coast Guard acted reasonably in response to reports that a boat operated by petitioners' decedents was in distress.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-18a) also is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on December 18, 1980. A petition for rehearing was denied on January 14, 1981 (Pet. App. 21a). The petition for a writ of certiorari was filed on April 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 19, 1973, the SEA BOY II, a 53-foot cabin cruiser, left Freeport for Nassau in the Bahama Islands with eight persons on board (Pet. App. 3a, 5a). Shortly after 8:00 p.m. on December 20, 1973, a Yugoslavian tanker, the SILBA, "received two garbled MAYDAY radio calls from

a vessel identifying itself as the Sea Boy" (*id.* at 6a). The SILBA interpreted the calls as stating: " 'MAYDAY. Sea Boy 2 Two Miles East of Whale Cay.' " The SILBA's repeated attempts to establish two-way communications with the SEA BOY were unsuccessful (*ibid.*).

The SILBA relayed the SEA BOY's MAYDAY message to all ships and stations on 500 KHZ, a Morse Code frequency. At 8:17 p.m. the Coast Guard's Rescue Coordination Center (RCC) for the Seventh Coast Guard District at Miami, Florida, received a call from the Coast Guard Radio Station in Miami (Radsta). Radsta informed RCC that it had received a MAYDAY message and asked for the location of Whale Cay. RCC told Radsta that there were two Whale Cays and asked Radsta " 'what's identification and problem?' " (Pet. App. 6a). Radsta replied that it did not know the nature of the problem and that it was unable to establish communications with the SILBA (*id.* at 6a-7a).

Radsta and another communications station attempted unsuccessfully for more than an hour to communicate with the SILBA. Although the SILBA continued to send the SEA BOY's MAYDAY distress message, it never altered its course to proceed to the distress location. During the attempts to communicate with the SILBA, Radsta notified RCC that the SILBA was relaying a MAYDAY message for " 'vessel Seabouy 2 [*sic*] who is in distress 2 miles east of Whale Cay' "and that Radsta could not establish communications with the SILBA (Pet. App. 7a).

At 8:54 p.m. RCC attempted to call the Bahamian Air and Sea Rescue Association (BASRA), and at 9:12 p.m. it briefed BASRA on the events described above. BASRA replied that it had no information about the SEA BOY but that it would try to contact the vessel. At 10:15 p.m. BASRA informed RCC that its efforts had been unsuccessful (Pet. App. 7a).

RCC also contacted the Federal Communications Commission to obtain information about the SEA BOY. The FCC gave RCC the names of two previous registered owners of the SEA BOY, but RCC received no relevant information from them (Pet. App. 7a).

At 9:25 p.m. that same day, RCC decided not to launch any vessels or aircraft to search for the SEA BOY until the next morning because of weather problems. Further communication difficulties and confusion developed at about 10:30 p.m., when a British merchant vessel, the CORNISH WASA, began to relay SILBA's transmissions, which were merely relays of SEA BOY's original distress messages. The CORNISH WASA also was unable to establish communications with the SEA BOY. At 10:37 p.m., after being informed that the CORNISH WASA was in an electrical storm, RCC requested the CORNISH WASA to stand by for communication. At 11:49 p.m., RCC noted that the CORNISH WASA did not know the nature of the SEA BOY's distress and was not proceeding to the reported location. Although RCC was informed of the locations of the SILBA and the CORNISH WASA, it continued to have difficulties communicating with both vessels (Pet. App. 8a).

At 11:57 p.m. the Coast Guard released the CORNISH WASA from communications standby, and at 12:22 a.m. it released the SILBA (Pet. App. 8a-9a). At 1:00 a.m. RCC notified the Commander of the Atlantic Area that it did not plan any action until the morning "[a]fter the weather clears" (*id.* at 9a).[1]

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[1] At 4:00 a.m. that same morning the Coast Guard received a MAYDAY call from another vessel. The Coast Guard was able to establish direct communications with this vessel and, after determining its position and distress situation, dispatched a helicopter and aircraft to aid the vessel (Pet. App. 9a).

The next morning, December 21, the Coast Guard sent an aircraft to search the two Whale Cays for the SEA BOY. The search of the cays was completed by 10:00 a.m. without success. RCC briefed BASRA on the situation and the search then was interrupted pending the receipt of additional information. At 7:10 p.m. BASRA notified RCC that the SEA BOY's owner had reported the vessel overdue from Freeport (Pet. App. 9a). The Coast Guard resumed its search and found the remains of the SEA BOY at 11:20 a.m. on December 24. The bodies of the passengers were never recovered (*id.* at 10a).

2. The administrator of the estates of the eight decedents brought suit for damages from the United States, alleging negligent acts or omissions in the rescue operations (Pet. App. 1a).[2] Following a bench trial in the United States District Court for the District of Columbia, the court concluded that the plaintiffs had failed to demonstrate the existence of a legal duty on the part of the Coast Guard to aid the SEA BOY (*id.* at 10a-16a). The court pointed out that the Coast Guard had no duty to undertake rescue efforts and never "took charge" of the SEA BOY search (*id.* at 11a-15a). It further stated that "[t]he record reveals initial confusion and uncertainty by all participants in the SEA BOY search, as a result of the meager information in hand and the difficulty of sustained communication" and that, under these circumstances, it could not "fault the judgment of those on duty * * *" (*id.* at 15a). The court specifically

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[2]The complaint originally also sought damages from the owner of the vessel for permitting navigation of an unseaworthy vessel and from the manufacturer of the SEA BOY for negligent design of the vessel. In addition, the owner filed a complaint for exoneration from, or limitation of, liability, pursuant to 46 U.S.C. 181 *et seq.* The cases were consolidated in the United States District Court for the District of Columbia (Pet. App. 1a). Prior to trial, the claims against the manufacturer and owner were settled. Only the claim against the United States proceeded to trial (*id.* at 2a).

noted the absence of proof that the Coast Guard's participation had deterred any would-be rescuer from proceeding in a timely fashion to the SEA BOY, particularly in light of the fact that neither the SILBA nor the CORNISH WASA ever established direct communication with the SEA BOY or made any effort to change its course to render assistance to the distressed vessel (Pet. App. 15a-16a).

In addition, as an alternative holding, the district court concluded that petitioners had failed to establish proximate cause. The court found that, "[s]imply stated, the loss of the Sea Boy remains shrouded in mystery" and that there was a "lack of sufficient direct and circumstantial evidence to relate Sea Boy's demise to any action of the Coast Guard" (Pet. App. 17a).

The court of appeals affirmed in a memorandum opinion (Pet. App. 1a-2a). The court found it unnecessary to reach the question whether the "Coast Guard had a legal duty * * * to do all things reasonably required to make a meaningful attempt to rescue [those on board the SEA BOY]" (*id.* at 2a). Rather, it concluded that "[t]he fact findings made by the District Court preclude a judgment that the Coast Guard's handling of the matter was irresponsible or outside the bounds of the considerable discretion it assuredly must have to determine its course of conduct when information is meager and conditions shifting and uncertain" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this fact-bound decision accordingly is not warranted.

1. The court of appeals, without reaching the question whether the Coast Guard had a legal duty "to do all things reasonably required to make a meaningful attempt to

rescue" a distressed vessel, concluded that the Coast Guard had acted reasonably in the circumstances of this case (Pet. App. 2a). As the district court found (*id.* at 15a):

> The record reveals initial confusion and uncertainty by all participants in the Sea Boy search, as a result of the meager information in hand and the difficulty of sustained communications. Instead of sending rescue forces out blindly to an unknown situation, RCC * * * determined to gain additional information, hopefully to clarify the nature of the distress and in the end to facilitate the search.
>
> Perhaps, in hindsight, some Coast Guard personnel other than those on duty on the night of December 20th might have taken other steps and launched an immediate sea-air rescue mission. But, we are dealing with discretion and judgment and we cannot in the circumstances of this case fault the judgment of those on duty to the point of declaring a violation of the legal responsibility on the part of the Coast Guard to the decedents.
>
> Finally, the plaintiffs have failed to prove to the Court's satisfaction that the Coast Guard's participation in this incident dissuaded any would-be rescuer from proceeding, timely, to the Sea Boy.

The court of appeals' conclusion that the Coast Guard acted reasonably, based on the district court's findings of fact, is plainly warranted.

2. Petitioner asserts (Pet. 7) that further review is necessary in order to determine "what standard of duty * * * Congress intend[ed] to impose" on the Coast Guard under

14 U.S.C. 88.[3] In holding that the Coast Guard acted reasonably, however, the court of appeals did not deem it necessary to reach that issue. Hence, the court must have assumed that the Coast Guard was required to meet the standard of duty urged by petitioners. In these circumstances, there is no reason for this Court to address the legal

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[3] 14 U.S.C. 88 provides:

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

(1) perform any and all acts necessary to rescue and aid persons and protect and save property;

(2) take charge of and protect all property saved from marine or aircraft disasters, or floods, at which the Coast Guard is present, until such property is claimed by persons legally authorized to receive it or until otherwise disposed of in accordance with law or applicable regulations, and care for bodies of those who may have perished in such catastrophes;

(3) furnish clothing, food, lodging, medicines, and other necessary supplies and services to persons succored by the Coast Guard; and

(4) destroy or tow into port sunken or floating dangers to navigation.

(b) The Coast Guard may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized.

duty issue, because a resolution of the question could not benefit petitioners.[4]

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[4]In any event, contrary to petitioners' assertion (Pet. 7, 9-10), there is no conflict among the circuits concerning the standard of duty imposed on the Coast Guard by 14 U.S.C. 88. As the district court noted (Pet. App. 11a), "[o]ther courts in different settings have recognized the permissive quality of the statutory language * * * and accordingly have ruled that there is no pre-existing legal duty on the Coast Guard to provide rescue services on demand." *United States* v. *Gavagan*, 280 F. 2d 319 (5th Cir. 1960), cert. denied, 364 U.S. 933 (1961), on which petitioners primarily rely, involved a "death resulting from *the manner in which the Government undertook* the unsuccessful rescue of the shrimper Donald Ray and her crew off the Florida Coast" (*id.* at 321; emphasis added). In contrast to the facts of the present case, the vessel in *Gavagan* had been sighted, but was lost as a result of an erroneous Coast Guard communication that deterred a commercial tanker located within five miles of the distressed vessel from coming to the latter's aid. *Id.* at 324. Indeed, in a subsequent case the Fifth Circuit described its decision in *Gavagan* as follows (*United States* v. *DeVane*, 306 F. 2d 182, 186 (5th Cir. 1962)):

> *Gavagan* went no further than affirming what is clear from the statutes—that the decision to undertake or abandon a rescue is discretionary with the Coast Guard * * *. But having undertaken the rescue and engendered reliance thereon, the obligation arose to use reasonable care in carrying out the rescue. And negligence in the operation would create liability if it was the proximate cause of loss or damage where the position of one was worsened in reliance on the undertaking by the Coast Guard.

Similarly, petitioners' reliance on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is misplaced. In that case, the government was held liable to a shipowner whose cargo was damaged as a result of the failure of a light in a lighthouse operated by the Coast Guard. The Court expressly noted (*id.* at 69), however, that "[t]he Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order * * *." In contrast, in the present case the Coast Guard did nothing to engender the reliance of petitioners' decedents or of potential rescuers. Indeed, as the district court found (Pet. App. 14a), the Coast Guard's Official Recreational Boating Guide "serves as an explicit reminder to the would be sea-farer that he should not venture blindly into unfamiliar waters, armed with

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the simple faith that the Coast Guard will extricate him from his self-made dilemmas, whenever and wherever those occur."

Finally, there is no merit to petitioners' legal position. As the district court pointed out (Pet. App. 11a), 14 U.S.C. 88 plainly *permits* but does not *require* the Coast Guard to assist persons and vessels in distress. In addition, neither the operational orders and internal guidelines nor the treaty obligations and executive order relied on by petitioners (Pet. 11, 13-14) establish any duty owed by the Coast Guard to third parties. See *United States* v. *Caceres*, 440 U.S. 741 (1979); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464, 471-472 (D.C. Cir. 1940), aff'd, 311 U.S. 470 (1941).

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